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No. 07-1567

FILED
SEP 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a minor, et al.,
Petitioners,

v.

MARTY EUVERARD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 509 (1969), this Court expressly held that the First Amendment rights of public school students extend to "the playing field." If the Petition for Writ of Certiorari is not granted, constitutional protection will extend only to cases where a student's speech involves a matter of public concern and only where school officials go so far as to suspend or expel the student for such speech.

REPLY TO RESPONDENTS' STATEMENT OF ADDITIONAL FACTS

Respondents did not dispute that the petition was circulated for a three-day period without any disruption.[1] Respondents did not dispute that Euverard developed a plan to identify those responsible. Respondents did not dispute that the principal told the father of Jacob Giles that "there's got to be consequences for whoever is involved in this" or that Euverard and the assistant coaches agreed that dismissing all players who signed was "an acceptable price to pay" for team unity. Finally, Respondents did not deny that, after it became evident that a large number had signed the petition, Euverard did not impose any punishment on those players who lied to him.

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[1] Although, Respondents represent that "Petitioners' case focuses entirely upon the written document identified as a petition..." (Opp., p. 1), the speech also includes statements that Euverard should be replaced with another coach.

Instead, Respondents engage in an *ad hominem* attack on the boys, painting them as disrespectful ruffians, accusing them of being insubordinate, and using inflammatory language such as "defiance," "impudence," and "insolence." The facts do not support this unjustified, personal barrage, and it is apparently just a tactic to minimize the First Amendment issues at stake. What Respondents now call "rank insubordination" was the statement by one – Joseph Dooley – that the boys wanted to talk to Euverard as a group instead of meeting alone with him. Euverard never told the players that he regarded this conduct as insubordinate, never said there would be punishment if they refused to meet alone, and subsequently told an assistant coach, "those three *decided to* leave." Euverard's description of the situation immediately after it occurred is inconsistent with his later justification. Further, there is no evidence that Euverard had ever disciplined a player for similar conduct in the past.

The District Court correctly found that, although the speech was protected, the basis for the dismissal was a question of fact, to be determined at trial. *Rutan v. Republican Party*, 497 U.S. 62, 67-68 (1990). Yet, Respondents ask this Court to determine that "the players were dismissed from the football team not because of the petition, but because of their subsequent insubordination." (Opp., p. 18). With respect to Dillon Spurlock, Respondents urge this Court to accept Euverard's version of events – that he voluntarily quit. (Opp., p. 4, n.4). This is an entirely improper request. What this Court must determine is whether, "[t]aken in the light most favorable to the party asserting the injury," the facts establish conduct

that is irreconcilable with the Constitution. *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007).

REPLY TO RESPONDENTS' ARGUMENTS

I. THE PETITION SATISFIES SUPREME COURT RULE 10(A) BECAUSE THERE IS A SPLIT AMONG THE CIRCUITS ON THREE DISTINCT AND IMPORTANT QUESTIONS OF FEDERAL LAW.

In construing Rule 10(a), Respondents assert, without citation to a case from any court, that "[t]here must be an intolerable conflict on the same matter of law or fact...." (Opp., p. 13). Based upon this broad premise, Respondents claim that Petitioners have not pointed to a case from another circuit where the facts and issues of law are the same but the decisions are contradictory. *Id.* In so doing, Respondents ignore the clear split of the circuits on three important issues of federal law.

A. There is a genuine conflict on the question whether a student may be punished where there is no evidence of substantial and material interference with the operation of the school.

In *Tinker*, this Court expressly held that mere "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . ." 393 U.S. 508-09. Here, the undisputed facts are that the circulation and signing of the petition did not cause any disruption. Yet, the panel dispensed with the need for actual evidence,

relying upon the opinions of sportswriters and professional athletes. In so doing, the Sixth Circuit followed the decision in *Wildman v. Marshalltown*, 249 F.3d 768 (8th Cir. 2001). The *Wildman* court acknowledged that "there was no specific evidence of a material disruption of a school activity. . .," but found that punishment for the "insubordinate speech" itself was appropriate. *Id.* at 771.

The Third, Second, Ninth, and Tenth circuits have held that actual evidence of disruption is required. In *Saxe v. State College*, 240 F.3d 200, 211 (3d Cir. 2001), the Third Circuit held that *Tinker* requires "a specific and significant fear of disruption, not just some remote apprehension of disturbance." The court found that the school's anti-harassment policy violated *Tinker* because it punished "not only speech that actually causes disruption, but also speech that merely intends to do so. . . ") (Alito, J). Similarly, in *Guiles v. Marineau*, 461 F.3d 320, 331 (2d Cir. 2006), the Second Circuit required some proof of disruption in concluding that censorship of images on a student's T-shirt violated *Tinker*.

The Tenth and Ninth Circuits have reached the same conclusion in cases that are extremely similar on the facts. *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) was discussed in the Petition, and that analysis will not be repeated. It is significant, however, that Respondents ignore the material facts in *Seamons*, where the Tenth Circuit rejected the school system's generalized "fear of a disturbance stemming from the disapproval" associated with the player's unpopular viewpoint. *Id.* at 1238. Similarly, in *Pinard v. Clatskanie*, 467 F.3d 755 (9th Cir. 2006), the Ninth

Circuit concluded that the First Amendment protected a petition circulated by a group of athletes as well as verbal complaints about the coach. *Id.* at 768.

B. The Ninth, Second, and Tenth Circuits have expressly rejected a requirement that student speech must involve a matter of public concern.

Because the panel expressly stated that whistle-blower cases or speech involving politics or religion would constitute protected speech, the opinion establishes a public concern requirement that "significantly alters First Amendment jurisprudence. . . ." (App. 39a) (Gilman, J.). In contrast, the three other circuits which have expressly considered this question are unanimous in rejecting this requirement. *Garcia v. S.U.N.Y. Health Serv. Center*, 280 F.3d 98, 106 (2d Cir. 2001); *Pinard*, 467 F.3d at 766; *Seamons v. Snow*, 206 F.3d 1021, 1030, n.4 (10th Cir. 2000). Therefore, there now is a clear split of authority in the circuits on whether student speech lacks protection unless it involves a matter of public concern.

C. There is a split between courts of appeals on the question whether punishment of student speech by the expulsion from an extracurricular activity constitutes adverse action.

Finally, there is a clear split of authority on the question whether expulsion from an extracurricular activity may be an adverse action under 42 U.S.C. § 1983. The Sixth Circuit and the Eighth Circuit have

applied the "ordinary firmness" standard to free speech cases involving adults (*Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999); *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001) *cert. denied*; however, these circuits have applied a more stringent standard to students. *Wildman*, 249 F.3d at 772; *Lowery* (App. 36a).

In contrast, multiple other courts have held that retaliation against students for engaging in protected speech should be measured by the "ordinary firmness" standard. *See, e.g., Seamons*, 84 F.3d at 1237; *Pinard*, 467 F.3d at 766; *Constantine v. Rectors & Visitors*, 411 F.3d 474, 500-01 (4th Cir. 2005); *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). In fact, in three of these cases, appellate courts have held that permanent dismissal from an athletic team would chill an ordinary student from engaging in the speech. *Seamons*, 84 F.3d at 1237; *Pinard*, 467 F.3d at 766; *Henley v. Tullahoma City Sch. Sys.*, 84 Fed. Appx. 539, 540 (6th Cir. 2003).

II. THE PETITION SATISFIES SUPREME COURT RULE 10(C) IN THAT THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The most telling omission in Respondents' brief is the failure to address the guidelines contained in Rule 10(c). Here, review of the Sixth Circuit opinion is warranted because it presents a far-reaching question of first impression: whether student speech rights fall outside the protections of *Tinker*, regardless of the specific punishment inflicted, as long as the students'

"ability to attend class has not been threatened." (App. 36a). Whether the student is an actor, a singer, a swimmer, or a member of the band, extracurricular activities are extremely important to students, and their loss would be devastating. It is essential for students, school officials, and district courts to know whether punishment involving these activities removes a student's speech from constitutional protection.[2]

A. Respondents do not address the standard in a retaliation case under 42 U.S.C. § 1983 for demonstrating an adverse action.

Respondents claim that "[t]he dismissal of the student athletes from the high school football team was not an adverse action so as to violate 42 U.S.C. § 1983..." (Opp., p. 19), but there is no analysis to undergird this conclusion. Respondents do not address the applicability of the 'unconstitutional conditions' doctrine and do not deny that the uniform standard for evaluating an adverse action is whether the punishment would "deter a person of ordinary firmness from continuing to engage in that conduct." *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005). Respondents do not dispute that plaintiff's evidentiary burden is merely to establish that the acts of retaliation amount to more than a *de minimus* injury. *Thaddeus-X*, 175 F.3d at 398. Respondents do not try to distinguish *Rutan, Crawford-El,* or other

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[2] The Second Circuit has already cited *Lowery* as authority for a student's being disqualified from running for senior class secretary based upon her speech. *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008).

cases which illustrate how a comparatively minor punishment may constitute the adverse action. *Rutan*, 497 U.S. at 76, n.8 (1990); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Siggers-Dell v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005); *Thaddeus-X*, 175 F.3d at 399; *Henley*, 84 Fed. Appx. at 540.

Instead, Respondents cite general principles from *Bethel* and *Hazelwood* that have nothing to do with the level of punishment necessary to have a chilling effect on student speech. Respondents also raise a red herring – that a student has no liberty interest in playing interscholastic athletics. (Opp., p. 19). Petitioners have never asserted a due process violation, and the District Court granted partial summary judgment based upon *Tinker*. Further, in *Perry v. Sindermann*, this Court made it abundantly clear that, where a government official retaliates against a citizen for exercising a constitutional right, the adverse action need only be the denial of some benefit -- not a life, liberty, or property interest. 408 U.S. 593, 597 (1972). These four students may not have had a constitutional right to play high school football, but they had a right not to be kicked off the team for exercising their First Amendment right to criticize an abusive adult.

B. Respondents do not deny that the particular viewpoint of the student-athletes was being targeted.

This Court has indicated that "the invocation of teamwork [and] loyalty" reflect a particular viewpoint. *Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001). The panel clearly agrees with this

viewpoint; without any evidence of disruption, the court concluded that the viewpoint expressed in the petition "undermined his ability to lead the team and threatened team unity." (App. 24a). Yet, in multiple cases, this Court has stressed that censorship based upon the viewpoint of the speaker is the most egregious type of First Amendment violation. *Morse v. Frederick,* 127 S. Ct. 2618, 2644 (2007) (Stevens, J., dissenting); *Good News Club*, 533 U.S. at 106-110; *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828 (1995); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Further, it is beyond cavil that the First Amendment protects the right to engage in speech that criticizes public officials. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Respondents do not deny these basic principles nor do they deny that the viewpoint of the student-athletes was being targeted by the administration. There are numerous facts which indicate that Respondents took action to squelch the viewpoint that Euverard needed to be replaced as coach:

* Euverard's conducting one-on-one interrogations and asking questions only about the petition to "smoke out' the culprits (App. 44a) (Gilman, J., concurring),

* High school principal calling Spurlock "stupid" for signing the petition,

* Three students who honestly admitted to signing the petition being separated from their teammates and directed to have their parents come to practice, and

* Principal's statement to Mr. Giles the night *before* any alleged insubordination that there had to be "consequences" for those who signed the petition.

The most compelling evidence that the viewpoint of the student-athletes was being targeted is found in Respondents' own brief: "Allow all the team members who did sign the petition *but recanted* and said they would play for the head coach to remain on the team." Opp., p. 28 [Emphasis added]. That is, those players who changed viewpoints had the sword of Damocles removed and were permitted to stay on the team. In so doing, Euverard and the school administration were censoring student speech based upon the "specific motivating ideology or the opinion or perspective of the speaker," a blatant and egregious violation of the First Amendment. *Morse*, 127 S. Ct. at 2644.

C. Respondents are incorrect in their assertion that the panel of the Sixth Circuit uses *Connick v. Myers*, 461 U.S. 138, 146 (1983) only as an analogy.

This Court has established separate tests of evaluating the free speech rights of minors attending public school and adults working for government employers. (App. 39a). *Morse*, 127 S. Ct. at 2625; *Connick v. Myers*, 461 U.S. 138, 146 (1983). Respondents do not dispute this distinction but argue that the lengthy discussion of the public concern test is merely argument by analogy. Opp. at 14-15. First, the analogy is inapposite. Public school students are minors, not adults, and there is a "gross disparity in power between a teacher and a student . . ."

Holloman v. Harland, 370 F.3d 1252, 1269 (11th Cir. 2004). Students attend public school by legal compulsion whereas public employees have voluntarily chosen to work for a governmental rather than private employer. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Where, as here, a student is zoned for a particular high school, he or she cannot simply quit and go to another high school.

An employer's basis for limiting an adult employee's speech rights at work is that, "without it, there would be little chance for the efficient provision of public services." *Id.* at 418. In contrast, concern with efficiency has never informed the free speech rights of students. Undoubtedly, schools could operate much more efficiently if student's speech rights were curtailed. Given the importance of students learning the value of free speech, this Court has established a high standard for restricting student speech. *Tinker*, 393 U.S. at 513. Granting free speech to students is consistent with the normative value that a democratic society places on the rights of its citizens to express their opinions. The public school is the training ground for such rights. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection").

Moreover, contrary to Respondents' conclusion, the panel went further than merely applying an analogy. Evidence is found in the panel's acknowledgement that it "must consider the content and context of the speech." (App. 10a). Just so, this Court has said that

to determine the boundaries of the public concern test, *Connick* "directs courts to examine the 'content, form, and context of a given statement, ..." *City of San Diego v. John Roe*, 543 U.S. 77, 83 (2004).

Evidence is also found in the acknowledgement that Euverard "could not dismiss a player simply because the player had religious or political views that were unpopular with his teammates" or in a "whistleblower situation, where players were disciplined for reporting improprieties." (App. 37a).[3] That is, the panel held that student speech in these areas – areas that have been held to be matters of public concern" – would be protected, but speech outside these areas could be censored. Thus, a player could advocate an extreme religious or political position, but he could not circulate a petition criticizing a coach because it "is reasonable to forecast that disruption will occur when a subordinate challenges the authority of his or her superior." (App. 33a – 34a, n.5). Further, since whistle-blowing is subject to protection, the panel apparently would have found the speech to be protected if only the phrase "because he hit my teammate" had been added to the petition.[4]

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[3] Respondents do not respond to the argument that this is a whistleblower situation. *Cain v. Tigard-Tualatin Sch. Dist. 23J*, 262 F. Supp. 2d 1120 (D. Or. 2003).

[4] The petition would then have read: "I hate Coach Euvard and I don't want to play for him because he hit my teammate."

CONCLUSION

The Sixth Circuit's decision that a school official may expel a student from an extracurricular activity based upon his or her viewpoint raises a novel and important question of federal law. Misused by a teacher, coach, or administrator, this weapon could undoubtedly chill a student from reporting abuse or other misconduct. For this reason, the Petition should be granted.

Respectfully submitted,

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